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Supreme Court of the United States

OCTOBER TERM, 1936

No. [redacted] 18

THE PEOPLE OF PUERTO RICO, PETITIONER,

vs.

THE SHELL CO. (P. R.) LIMITED, *et al.*,
RESPONDENTS.

BRIEF FOR RESPONDENTS

Pyramid Products, Inc., Ernest Yates, Justice Banks, and Anibal Calaf,

IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

OSCAR R. FRAZER,
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Counsel for named Respondents.

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Supreme Court of the United States

October Term, 1936.

No. 842.

THE PEOPLE OF PUERTO RICO, PETITIONER,

vs.

THE SHELL CO. (P. R.) LIMITED, *et al.*,
RESPONDENTS.

BRIEF FOR RESPONDENTS PYRAMID PRODUCTS, INC., ERNEST YATES, JUSTICE BECKE, AND ANIBAL CABRA, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

Preliminary Statement.

This is a petition for a writ of certiorari to review a judgment of the United States Circuit Court of Appeals for the First Circuit, entered November 20, 1936, unanimously affirming a judgment of the Supreme Court of Puerto Rico, entered on December 20, 1935. The action is a criminal prosecution by information before an insular District Court in Puerto Rico.

The Question Presented.

The question presented in this proceeding is:

When Congress, admittedly acting within its Constitutional powers, has declared a certain act to be a Federal crime to be tried in and punished by the Federal district court, has the Legislature of Puerto Rico power to enact a law declaring the same identical act to be a crime against the People of Puerto Rico cognizable in and punishable by the territorial courts of Puerto Rico?

Petitioner contends that the Legislature of Puerto Rico has such power and that upon the enactment of such local law the Federal and the insular courts have concurrent jurisdiction to try and to punish the commission of such act, but that when either court has acted the other is deprived of the power to proceed either under the Act of Congress or under the local law. Petitioner in effect contends that the Legislature of Puerto Rico has the power thus to nullify the provision of the Act of Congress that such crime shall be cognizable by the Federal Court and further that the Legislature has power to deprive the Federal Court of any authority to proceed as provided in the Act of Congress, once a prosecution has been begun in the territorial court.

Respondents contend (and the Supreme Court of Puerto Rico and the Circuit Court of Appeals so held) that the local law is void and that the Federal Court alone has jurisdiction to try and to punish offenders guilty of doing the prohibited act.

Statement of the Case.

The Insular District Attorney filed an information before the District Court for the judicial district of San Juan against respondents, charging them with a conspiracy in restraint of trade, a misdemeanor, in violation of an Act of the Legislative Assembly of Puerto Rico, approved March 14, 1907. The respondents are four corporations engaged in the sale and distribution of gasoline in Puerto Rico, certain of their agents, officers and employees, and certain retail dealers in gasoline. The information is printed at length in the Record at pages 1 to 5 inclusive. It charges that the corporate respondents

> "illegally, of their own volition and maliciously, during the time mentioned in this information, entered into a conspiracy and agreed on a plan previously framed by them, with the sole purpose of restraining and preventing the free competition among said corporations, the lawful and free competition of the business, and the contracts for the distribution and sale of gasoline in the judicial district of San Juan and in the municipality of San Juan, which is under the jurisdiction of this court. Such common plan as agreed upon with said purpose was executed by the agents, representatives and employees whose names have been mentioned in the second paragraph of this information, and during the time mentioned and prior to that date they had and still have under their control the direction, management and operation of the business of these corporations."

The information further charges that the respondent corporations committed certain overt acts in pursuance of such conspiracy and that the remaining respondents joined in said conspiracy and in the commission of such acts.

The respondents demurred to this information upon various grounds, among others, that the Legislative Assembly of Puerto Rico had no power to enact the Act of March 14, 1907 under which the information was filed, and that such Act is null and void, for the reason that Congress had already legislated upon the subject covered by that Act.

On December 22, 1934, the District Court sustained the demurrer and entered judgment dismissing the information (R. 27), upon the ground that the Sherman and Clayton Acts covered the entire field covered by the local act of March 14, 1907, that the latter Act was therefore without force, and that the United States District Court for Puerto Rico had jurisdiction of the offense charged. The District Court followed the decision of the Supreme Court of Puerto Rico to the same effect in *The United Theatres, Inc.* v. *District Court of San Juan,* 47 D. P. R. 725.

Petitioner then appealed to the Supreme Court of Puerto Rico from this judgment (R. 27) and the various respondents moved the Supreme Court of Puerto Rico to dismiss the appeal as frivolous, inasmuch as it had already decided the precise question involved in the *United Theatres* case (R. 29).

After hearing the parties, the Supreme Court on December 20, 1935, by unanimous decision dismissed the appeal (R. 45) with an opinion by Mr. Justice

CORDOVA DAVILA (R. 36). In its opinion the Supreme Court followed its own decision in the *United Theatres* case and held that Congress, having passed the Sherman Act, which is in force in Puerto Rico and which covers the same ground as the local statute, the Legislature was without power to legislate upon the same matter and that the local Act was void.

Thereafter petitioner appealed to the United States Circuit Court of Appeals for the First Circuit which on November 20, 1936, also by unanimous decision, affirmed the judgment of the Supreme Court of Puerto Rico (R. 61) with a carefully considered opinion by Circuit Judge BINGHAM which appears in the Record at page 49. The Circuit Court of Appeals held (R. 58):

> "But here the subject matter covered by the Puerto Rican statute and upon which the information is based is the same as the subject matter covered by the Act of Congress of 1890; and the act charged in the information and denounced as a crime by the island statute and over which the insular courts are given jurisdiction, is the same as that denounced as a crime in the Act of Congress of 1890, over the prosecution of which the federal District Court of Puerto Rico has original and exclusive jurisdiction. In each instance the offense was a crime against the sovereignty of the United States, but the Act of Congress is the paramount law on the subject. * * * There being a single sovereignty whose laws are violated and for which there can lawfully be but one punishment, and the Act of Congress being the supreme law, there can be but one conclusion and that is that the act of 1890 preempted the ground or superseded the local act relating to the same matter, and that the island district court was without jurisdiction of the offense."

Statutes Involved.

The Puerto Rico Act under which this information was brought, Act of March 14, 1907 (Laws 1907, page 328; 1911 Revision, Par. 2372) is copied almost verbatim from the Sherman Act. The pertinent provisions of the Puerto Rico Act are as follows:

> "Section 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade, commerce, business transactions, and lawful and free competition in a town, or among the several towns of Porto Rico is hereby declared to be illegal. Every person who shall make any such contract or engage in any such conspiracy shall be deemed guilty of a misdemeanor and on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year or by both such punishments in the discretion of the court.
>
> "Section 2. Every person who shall monopolize or attempt to monopolize or combine or attempt to combine with any other person or persons to monopolize any part of the trade or commerce in any town of Porto Rico or between the towns thereof shall be deemed guilty of a misdemeanor and shall be punished by a fine not exceeding five thousand dollars or by imprisonment not exceeding one year, or by both such punishments, in the discretion of the court.
>
> "Section 3. The district courts of the island are hereby vested with jurisdiction to prevent, prohibit, enjoin and punish violations of this law; and it shall be the duty of the attorneys

of the district courts of the island to institute proceedings of injunction or any other civil proceeding to prevent, prohibit, enjoin, and restrain such violations. * * *

* * * * * * * * *

"Section 5. Any person who shall be injured in his business or property by any other person, corporation, company or association, by reason of anything forbidden or declared to be unlawful by this Law, may sue therefor in the court for the district in which the defendant resides, or in the court for the district in which the plaintiff resides, and shall recover the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

The information is brought wholly under Section 1 of this Act and not under Section 2. The information nowhere contains the word "monopolize" nor does it charge any monopoly as referred to in Section 2 of the Act.

The Sherman Act itself (15 U. S. C. A. 3, *et seq.*) provides as follows:

"3. *Trusts in Territories or District of Columbia illegal; combination a misdemeanor.* Every contract, combination in form of trust or otherwise, or conspiracy, in restraint of trade or commerce in any Territory of the United States or of the District of Columbia, or in restraint of trade or commerce between any such Territory and another, or between any such Territory or Territories and any State or States or the District of Columbia, or with foreign nations, or between the District of Columbia and any State or States or foreign nations, is declared illegal.

> Every person who shall make any such contract or engage in any such combination or conspiracy, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding $5,000, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court (July 2, 1890 c. 647, sec. 3, 26 Stat. 209).
>
> "4. *Jurisdiction of courts; duty of district attorneys; procedure.* The several district courts of the United States are invested with jurisdiction to prevent and restrain violations of sections 1 to 7, inclusive, or section 15 of this chapter; and it shall be the duty of the several district attorneys of the United States, in their respective districts, under the direction of the Attorney General, to institute proceedings in equity to prevent and restrain such violations."

It is conceded that the Sherman Act is in force in Puerto Rico and that it was in force in Puerto Rico at the time of the attempted enactment of the local statute of March 14, 1907, by virtue of the provision in the present and in the former Organic Act of Puerto Rico to the effect that the statutory laws of the United States not locally inapplicable shall have the same force and effect in Puerto Rico as in the United States. (See Section 9, Act of March 2, 1917). Referring to the Sherman Act and the Clayton Act, the Petitioner at page 13 of its brief before the Circuit Court of Appeals concedes:

> "that those statutes are in force in the Island (Confer *Domenech, Treasurer* v. *National City Bank of New York,* 294 U. S. 199, decided Feb-

ruary 4, 1935, since the date of the decision of the Insular Supreme Court in the United Theatres case), and that they form a part of the body of the local law of the Island, enacted for it by the Congress in its capacity of supreme legislature for the Island under Clause 2 of Section 3 of Article IV of the Constitution."

Section 41 of the Organic Act of Puerto Rico (Act of March 2, 1917) provides:

> "Sec. 41. That Porto Rico shall constitute a judicial district to be called 'the District of Porto Rico.' The District Court for said district shall be called 'The District Court of the United States for Porto Rico.' Such district court shall have jurisdiction over all cases cognizable in the district courts of the United States and shall proceed in the same manner"

while Section 24 of the Judicial Code (28 U. S. C. A. 41) provides:

> "Sec. 41. Original jurisdiction. The district courts shall have original jurisdiction as follows:
>
> "(2) Crimes and offenses. Second. Of all crimes and offenses cognizable under the authority of the United States."

Outline of the Argument.

These respondents will argue:

1. That there is no basis for granting a writ of certiorari in this case; and

2. That the decision of the Circuit Court of Appeals is correct both upon authority and upon principle.

POINT I.

There is no basis for granting a writ of certiorari in this case.

Of all of the possible reasons for granting a writ of certiorari as set forth in Rule 38 of this Court, the only reason alleged in the petition herein (see petition, p. 7) is that the Circuit Court of Appeals

> "has decided an important question of Federal law which has not been, but should be, settled by this Court" (Rule 38).

We shall therefore consider first, what important question of Federal law was decided by the Circuit Court of Appeals, and second, whether that question has or has not been settled by this Court.

What was the important question of Federal law decided?

As a basis of its decision the Circuit Court of Appeals held:

1. "That the act charged in the information and denounced as a crime by the island statute is the same as that denounced as a crime in the Act of Congress of 1890" (R. 58).

2. That there is a conflict between the island statute and the Act of Congress in that by the island statute the insular Courts are given jurisdiction over the offense charged in the information, while by the Act of Congress the Federal District Court for Puerto

Rico has original and exclusive jurisdiction over that offense (R. 58).

3. That as to this particular matter (jurisdiction over the offense charged in the information) in which the two acts are in conflict, the Act of Congress is the "paramount law on the subject," the local act must fall, and the island district court is without jurisdiction of the offense (R. 58).

This is all that the Circuit Court of Appeals was called upon to decide and all that it did decide in this case. It was called upon to decide the validity of the information filed against the respondents in the insular court. It was not called upon to decide the validity of some other information which might possibly be filed sometime under some other Section of the Statute, as for example, an information for violation of Section 2 prohibiting monopolies. Whether such an information would or would not be valid was not before the Circuit Court and the Court did not decide that question. The Circuit Court did not decide that when Congress has legislated upon a certain subject this precluded the Insular Legislature from passing any legislation whatever in that field. Such question was not before the Court or in any way involved in the decision of the single question presented to it, *i.e.*, the validity of this particular information charging the same identical offense as that denounced by Section 3 of the Sherman Act. The Circuit Court did not decide whether or not the territorial Legislature may pass an act on the subject of restraint of trade which does not conflict with the Federal act.

Such question was not before the Court. The situation before the Court and decided by it was a situation where the insular act does in fact conflict with the Federal act on the question of jurisdiction of the offense charged in the information, and the decision of the Circuit Court is limited to a decision as to the validity of the insular act on this matter in which it does conflict with the Federal act.

Examining the actual decision of the Circuit Court with relation to the facts presented to it on the record, it is apparent that the Circuit Court decided only one Federal question, which is the question referred to in the Paragraph above numbered 3. Whether the act charged in the information is the same act as that denounced by the Sherman Act is not a Federal question but a matter of comparing the wording of the information with the wording of the Sherman Act as written. Furthermore, there has never been any dispute as to the decision reached by the Circuit Court on this point. Petitioner has never contended and does not now contend that the offense charged in the information is not the same offense as that denounced in Section 3 of the Sherman Act.

Likewise, the finding of the Circuit Court that there is a conflict between the provision of the Federal act giving the United States District Court original and exclusive jurisdiction of this offense and the provision of the insular act giving the insular district courts jurisdiction over the same offense, is not a decision of a Federal question. That there is a conflict in this respect between the two statutes appears of necessity from a reading of the two statutes themselves.

The finding that one act *says* that the Federal District Court shall have jurisdiction, while the other act *says* that the insular district courts shall have jurisdiction over the same offense, both statutes being before the Court, is not the decision of a Federal question but is a mere recitation of the plain wording of the Acts themselves. The findings of the Circuit Court of Appeals referred to in the Paragraphs numbered 1 and 2 above do not decide any Federal question and consequently cannot be the basis for a writ of certiorari by this Court.

The only Federal question decided by the Circuit Court is its decision that

> When there is a clear conflict between the Federal Act and the Territorial Act the Federal Act must prevail and the Territorial Act must fall.

This question, however, has been settled by this Court.

In *Davis* v. *Beason,* 133 U. S. 333, there was a Federal Act declaring that no bigamist or polygamist should be entitled to vote. The Territorial Legislature passed an act prohibiting the right to vote to any person teaching, advising or counselling the practice of bigamy and polygamy. Davis was indicted and convicted in a territorial court of Idaho for a violation of the Territorial statute. It was urged that the Territorial statute was without effect because it covered the same field or subject matter as the Act of Congress. This Court rejected such contention, however, upon the specific ground that the offense referred

to in the Idaho statute and in the indictment was a different offense from that covered by the Act of Congress; that the Act of Congress contained no prohibition against teaching, advising or counselling bigamy and polygamy and that therefore the Territorial statute was effective. In its opinion, this Court says:

> "The cases in which the legislation of Congress will supersede the legislation of a State or Territory, without specific provisions to that effect, are those in which the same matter is the subject of legislation by both. There the action of Congress may well be considered as covering the entire ground. But here there is nothing of this kind. The Act of Congress does not touch upon teaching, advising and counselling the practice of bigamy and polygamy, that is, upon aiding and abetting in the commission of those crimes, nor upon the mode adopted, by means of the oath required for registration, to prevent persons from being enabled by their votes to defeat the criminal laws of the country."

In the case of *El Paso & North Eastern Railway Co.* v. *Gutierrez,* 215 U. S. 87, this Court held that a certain provision of a statute of the Territory of New Mexico was invalid because it conflicted with the provisions of the Federal Employers' Liability Act. The Territorial statute provided that no action for injuries causing death should be maintained unless the claimant within ninety days after the infliction of the injury, and thirty days before suit, should serve upon the defendant an affidavit covering certain particulars as to the injuries. This Court held that the Legislature

of the Territory was without power to require such affidavit as a condition precedent to bringing suit, since the Federal Employers' Liability Act contained no such requirements and that the Territorial Legislature could not thus limit the Federal Act. In that case this Court said:

> "In view of the plenary power of Congress under the Constitution over the Territories of the United States, subject only to certain limitations and prohibitions not necessary to notice now, there can be no doubt that an act of Congress undertaking to regulate commerce (by common carriers) in the District of Columbia and the Territories of the United States would necessarily supersede the territorial law regulating the same subject."

In the case of *Santa Fe Railway Co.* v. *Friday*, 232 U. S. 694, this Court held that the jurisdiction of the Federal District Court of a territory is original and exclusive over an action arising under the Federal Employers' Liability Act and that the Legislature of the territory could not take that jurisdiction away if it attempted to do so.

Petitioner argues, under POINT VI, page 19 of its brief, that Congress has conferred as plenary local legislative power upon the Legislature of Puerto Rico as that habitually exercised by the Legislature of a State, but in the cases of *Southern Railway Co.* v. *Railroad Commission*, 236 U. S. 439 and *Texas & Pacific Railway Co.* v. *Rigsby*, 241 U. S. 33, this Court held specifically that where a State Statute is in conflict with a Federal statute under the Commerce Clause, the latter must prevail.

The single Federal question decided by the Circuit Court of Appeals has thus been long ago conclusively settled by the decisions of this Court. In its brief, under POINT X, page 23, the petitioner admits that

> "If there be conflict or inconsistency, then, of course, the local (State or Territorial) Statute must give way."

It would seem that the petitioner thus concedes the correctness of the decision of the Circuit Court of Appeals upon the only Federal question in the case, for this is exactly what the Circuit Court of Appeals decided.

It is submitted that there is no ground shown by the petition in this case for granting a writ of certiorari to review the decision of the Circuit Court of Appeals.

POINT II.

The decision of the Circuit Court of Appeals is correct.

The two Statutes are in conflict on the matter of jurisdiction.

The Federal Act provides that

> "The several District Courts of the United States are vested with jurisdiction to prevent and restrain"

the offense charged in the information (Section 4, Sherman Act, *supra*), and the Judicial Code provides that

> "The (Federal) District Courts shall have original jurisdiction * * * over all crimes and offenses cognizable under the authority of the United States" (28 U. S. C. A. 41, *supra*)

while the local statute provides

> "The District Courts of the Island are hereby vested with jurisdiction to prevent, prohibit, enjoin and punish violations of this law" (Act March 14, 1907, Section 3, *supra*).

The term "original jurisdiction" as used in the Judicial Code and in the Judiciary Acts which preceded it has been so often construed as equivalent to "exclusive jurisdiction" that such construction cannot now be questioned.

> "District Courts have exclusive jurisdiction to enforce criminal, penal and quasi penal legislation of the United States. It is only in its own courts that the United States may proceed to enforce its criminal, penal or quasi penal legislation. The District Courts have, therefore, exclusive jurisdiction of all crimes and offenses against the United States, of all suits for penalties and forfeitures incurred, and all seizures made under the laws of the United States."
>
> Rose's Federal Jurisdiction and Procedure, Second Edition, Section 77.

We fail to see how there can be any question but that the Federal law and the Territorial Act are inconsistent in these provisions. It seems clear that both cannot stand. If the Territorial Legislature may give the Territorial Courts jurisdiction of the offense re-

ferred to in identical terms in both statutes, and if, as petitioner contends, the Federal Court loses all power to deal with the offense once a prosecution has been begun in the Territorial Courts, then the words of the Federal Statutes quoted above are left with no force whatever.

While it is admitted in petitioner's brief (page 23), that

> "If there be conflict or inconsistency, then, of course, the local (State or Territorial) statute must give way",

nevertheless the petitioner takes the position that there is no conflict, as for example, on page 7 of the Petition, where it is stated

> "inasmuch as the local act is not in conflict with the federal statutes, but is in harmony with them, and supplements the federal statutes by covering 'monopolies' also, and by providing remedies in the insular courts"

and on page 12 of petitioner's brief, where it is stated that

> "The local anti-trust and anti-monopoly act of Puerto Rico here in question is not in conflict in any way with the federal anti-trust acts",

and again on page 29 where petitioner states:

> "The local act prescribes no rule contrary to, or inconsistent with, the federal statutes; creates no inconsistent duty; and neither directs the doing of anything forbidden by the federal statute, nor forbids the doing of anything required by federal law."

Petitioner, however, fails to explain this seemingly self-evident conflict between the two statutes on the

question of jurisdiction, unless the discussion on page 44 of petitioner's brief may be considered as such explanation.

There, discussing a prosecution in the Federal Court as compared with a prosecution in the insular court, petitioner states—

> "Appeals from both courts go to the same appellate tribunal, the Circuit Court of Appeals for the First Circuit, with precisely the same opportunity ultimately to be brought up to this Court by petition for review on certiorari. It appears to be wholly immaterial to the ultimate decision whether the original prosecution be brought in the local insular district court or in the local so-called federal district court. In either case the judgment would be a bar to any possible prosecution in the other court."

The difference, however, between a prosecution in the Federal District Court and a prosecution in the Territorial Court is a real and not a merely technical one. Congress has in effect provided that the offense shall be prosecuted exclusively before a judge appointed by the President of the United States, that the accused shall have a trial by jury, that if convicted the accused shall be held under the custody of Federal authorities and confined in a Federal prison, that he shall be subject to the parole and good behavior provisions of the Federal statutes relating to federal convicts and that he shall be pardoned only by the President. But punishment for the crime is left very largely to the discretion of the judge who tries the case and Congress has decreed that this discretion shall be exer-

cised exclusively by a Federal Judge appointed by the President. The local statute in effect provides that the accused shall be tried before a judge appointed by the Governor of Puerto Rico, without a jury, that if convicted he shall be confined in a Puerto Rico prison subject to the local statutes as to parole and subject to pardon by the Governor of Puerto Rico.

Where there is a conflict between the federal and territorial statutes, the Federal Act must prevail.

This is the rule established by the decisions of this Court in—

Davis v. *Beason,* 133 U. S. 333;
El Paso & North Eastern Railway Co. v. *Gutierrez,* 215 U. S. 87;
Santa Fe Railway Co. v. *Friday,* 232 U. S. 694;
Southern Railway Co. v. *Railroad Commission,* 236 U. S. 439;
Texas & Pacific Railway Co. v. *Rigsby,* 241 U. S. 33,

all of which cases are discussed under Point I, *supra.*

We would also refer to *Territory* v. *Alexander,* 11 Ariz. 172, 89 Pac. Rep. 514, decided by the Supreme Court of the former Territory of Arizona. There the situation was identical with the situation in the present case, except that the two statutes involved cover the crime of bigamy, and the Supreme Court of the Territory held that the territorial statute was without force.

The decisions of the Territorial Courts relied upon by petitioner are based upon a contention that has been squarely overruled by this Court.

Petitioner relies entirely upon certain decisions by the respective Supreme Courts of various of the Territories, to wit:

Territory v. *Long Bell Lumber Co.*, 22 Okla. 890; 49 Pac. 911;
Wagner v. *Minnie Harvester Co.*, 25 Okla. 558; 106 Pac. 969;
In re: Murphy, 5 Wyo. 297; 40 Pac. 398;
Territory v. *Guyott*, 9 Mont. 46; 22 Pac. 134;
State v. *Norman*, 16 Utah 457; 52 Pac. 986.

These cases all follow the same line of reasoning, which is that there are two distinct sovereignties, the sovereignty of the United States and the sovereignty of the Territory, that a man owes a duty to each sovereignty and may be punished by each for an infraction of that duty; that a single act may constitute two offenses, one against the United States and one against the Territory, and that each may punish him for the same identical act and for the same identical offense.

The basis for these decisions is well shown by the following excerpt from the opinion in *State* v. *Norman* (*supra*):

> "Each inhabitant of the territory of Utah was also an inhabitant of the United States, and was therefore a subject of each government, and owed allegiance to and was amenable to the laws of each. If, therefore, he perpetrated an

> act which constituted an offense against the United States and also an offense against the territory and its local laws, we know of no legal principle which prevented him from becoming subject to punishment by each government, and neither of such punishments would be in contravention of the constitutional inhibition against the twice putting in jeopardy for the same offense,"

and by the following excerpt from the opinion in *Territory* v. *Long Bell Lumber Co.* (*supra*):

> "Nor is it any argument against the validity of this Act that a violator of it was liable to be prosecuted twice for the same offense * * *. The rule in this respect is properly declared by the Supreme Court of Montana in the case of *In Re Murphy*, supra, as follows: 'The contention that the law of the territory was not valid, because the same act was punishable as a crime under the laws of the United States, and therefore, if they both were in force, the person committing the crime would be subject to punishment twice for the same offense, is not sound, as the Federal Government could punish it as a crime against it while at the same time it might be a crime punishable under the laws of the Territory. In this respect there is no distinction between a state and a territory in their respective relations to the general government.'"

This line of reasoning was expressly rejected by this Court in *Grafton* v. *United States*, 206 U. S. 333, where this Court held that in a territory there are not two distinct sovereignties as in the case of a state,

but only one, which is the sovereignty of the United States, and that there cannot be two distinct offenses, one against the territory and one against the United States. Pointing out the distinction between a state and a territory in this respect, this Court said:

> "The Government of the United States has no power, except as expressly or by necessary implication has been granted to it, while the several states may exert such powers as are not inconsistent with the Constitution of the United States, nor with a republican form of government, and which have not been surrendered by them to the general government. An offense against the United States can only be punished under its authority and in the tribunals created by its laws; whereas, an offense against a state can be punished only by its authority and in its tribunals. The same acts, as held in Moore's case, may constitute two offenses, one against the United States and the other against a state. But these things can not be predicated of the relations between the United States and the Philippines. The Government of a state does not derive its powers from the United States, while the Government of the Philippines owes its existence wholly to the United States, and its judicial tribunals exert all their powers by authority of the United States. The jurisdiction and authority of the United States over that territory and its inhabitants, for all legitimate purposes of government, is paramount. So that the cases holding that the same acts committed in a state of the Union may constitute an offense against the United States and also a distinct offense against the state do not apply here,

> where the two tribunals that tried the accused exert all their powers under and by authority of the same government,—that of the United States."

Petitioner now admits (petitioner's brief, page 41) that the reasoning of this line of territorial cases cannot be sustained; that there is, as held in the *Grafton* case only one sovereignty in a territory, and that a single act cannot constitute an offense against the United States and at the same time a separate offense against the territory. Petitioner maintains, however, that the decision reached in this line of cases is correct, although the reasoning is wrong. Petitioner maintains that while there is but one single offense where both the Federal and the territorial statutes declare a certain act to be a crime, that the Courts of the United States and of the territory have concurrent jurisdiction to try and to punish a person guilty of that prohibited act. Petitioner attempts to justify this contention by the decision of this Court in the *Grafon* case (*supra*).

The *Grafton* case does not support petitioner's contention.

Grafton was an American soldier on active duty in the Philippines. While on sentry duty he shot and killed a native of the Islands. He was tried by Court Martial under the 62d Article of War and acquitted. Thereafter he was tried by the civil authorities in a Civil Court and convicted of homicide under the Philippine Criminal Code. Upon appeal this Court

held that this constituted double jeopardy for the same offense and reversed the conviction.

The 62d Article of War then read as follows (copying from opinion 206 U. S. 333):

> "All crimes not capital, and all disorders and neglects which officers and soldiers may be guilty of to the prejudice of good order and military discipline, though not mentioned in the foregoing Articles of War, are to be taken cognizance of by a general, or a regimental, garrison, or field officers' court-martial, according to the nature and degree of the offense, and punished at the discretion of such court."

Discussing the question of jurisdiction, this Court said:

> "The 62d article of War, in express words, confers upon a general, or a regimental garrison, or field officers' court-martial, according to the nature and degree of the offense, jurisdiction to try 'all crimes' not capital, committed in time of peace by an officer or soldier of the Army. The crimes referred to in that article manifestly embrace those not capital, committed by officers or soldiers of the Army in violation of public law as enforced by the civil power. No crimes committed by officers or soldiers of the Army are excepted by the above article from the jurisdiction thus conferred upon courts-martial, except those that are capital in their nature. While, however, the jurisdiction of the general courts-martial extends to all crimes, not capital, committed against public law by an officer or soldier of the Army, within the limits of the territory in which he is serving, this jurisdiction is

> not exclusive, but only concurrent with that of the civil courts. Of such offenses courts-martial may take cognizance under the 62d Article of War, and, if they first acquire jurisdiction, their judgments cannot be disregarded by the civil courts for mere error or for any reason not affecting the jurisdiction of the military court."

This Court therefore expressly held that a court-martial acting under the 62d Article of War was exercising concurrent and not an exclusive jurisdiction, since the court-martial was trying not an offense against an Act of Congress but an offense committed by a soldier in violation of the local statute. As pointed out by the Circuit Court of Appeals in its opinion (R. 57) there was but one single statute in the *Grafton* case covering the offense for which Grafton was tried and that was a territorial statute, although Congress had given the Army courts jurisdiction to try a violation of that local statute when committed by a soldier on duty. In trying Grafton, the Army Court was not trying him for a violation of any Act of Congress or for committing any offense which Congress had declared to be a crime. They were trying him for an act which the territorial statute declared to be a crime and they were given jurisdiction to try him for that local crime under the local statute because of his personal status as a member of the armed forces of the United States.

Here, however, there are two statutes attempting to define and to punish the same act and each purports to give exclusive jurisdiction over that crime to a different court. The Sherman Act which made the act a

crime and provided for its punishment, as well as the general provision of Section 24 of the Judicial Code of the United States, gave to the United States District Court *exclusive* and not *concurrent* jurisdiction to try that offense. The decision in the *Grafton* case clearly cannot sustain petitioner's contention, nor can it save the decisions of the Territorial Courts in that line of cases relied upon by petitioner.

The decision is clearly right on principle.

There is nothing peculiar about a violation of the Sherman Act to differentiate it from any other Federal crime for which Congress under its constitutional powers has provided that a punishment be administered by the Federal Courts. A conspiracy in restraint of trade is merely one of that great body of crimes which have come to be known and considered as exclusively Federal crimes. If the Legislature of Puerto Rico can prevent a federal prosecution under the Sherman Act by giving the local courts concurrent jurisdiction of the offense, it could just as well prevent a federal prosecution of any of these other federal crimes by the same procedure. If petitioner's contention be sustained the Legislature could pass a statute giving the local courts jurisdiction over a prosecution for a robbery of the mails, or embezzlement by a postmaster and if the local statute be valid and the local court rushes in and takes jurisdiction before the Federal Court, the Federal authorities would be powerless to prosecute for such federal crimes. So with smuggling and crimes against the

customs laws of the United States, crimes against the National Banking Act, crimes against the Internal Revenue Laws of the United States, including the Income Tax Act, counterfeiting, offenses against the Mann Act, espionage, and all of the other federal crimes. If petitioner's contention be correct, the Legislature of Puerto Rico and the Legislatures of the other territories could pass statutes covering these same crimes, differing from the Federal law only in giving jurisdiction over prosecution to the local courts, and could take away from the Federal Government in a most effective manner the prosecution of its own criminal statutes. Surely Congress had no such intention when it granted to the Legislature of Puerto Rico the power to legislate locally and when it conferred upon the Legislature the police power argued at such length in petitioner's brief. Such result would be not only contrary to all precedent but contrary to the American system of government itself.

Conclusion.

The petition for certiorari should be denied.

Respectfully submitted,

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